

SEP - 5 2008

Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 35164

PETITION OF BNSF FOR DECLARATORY ORDER

223535

KESSLER'S REPLY TO BNSF'S

AMENDMENT TO PETITION

1. Edwin Kessler ("Kessler"), herewith files Kessler's Reply to BNSF's Amendment to Petition.

BACKGROUND INFORMATION

2 On September 23, 2005, BNSF filed a Notice of Exemption ("NOE") to abandon 2.95 miles of the Chickasha rail line, between MP 539.96 and MP 542.91, all in Oklahoma County, OK. See *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK*, STB Docket No. AB-6 (Sub-No 430X) ("Abandonment Exemption"). This portion of the Chickasha line is the subject of the above entitled proceeding. Since the NOE contained false and misleading statements, on June 5, 2008, the Board rejected the NOE as void *ab initio*

3 On July 15, 2008, the BNSF Railway Company ("BNSF") filed a Petition for Declaratory Order ("Petition"), asking the Surface Transportation Board ("Board") to institute a declaratory order proceeding for the purpose of:

A. Declaring that BNSF's proposed abandonment and removal of that portion of its Chickasha Line that lies between MP 539.96 and MP 540.15 ("Eastern Segment"), which is located in Oklahoma County, OK, constitutes an unregulated 'relocation' of, rather than an abandonment of, a portion of its Chickasha line;

B Declaring that BNSF's proposed abandonment and removal of that portion of its Chickasha Line that lies between MP 540.15 and MP 541.69 ("Middle Segment"), which is

located in Oklahoma County, OK, constitutes an unregulated 'relocation' of, rather than an abandonment of, a portion of its Chickasha line,

C Declaring that the United States District Court for the Western District of Oklahoma ("**District Court**"), does not have the jurisdictional authority to enjoin BNSF from attempting to implement its proposed "relocation projects," without prior Board approval.

4. In its Declaratory Order Petition, BNSF states that it intends to institute an abandonment proceeding at some unspecified future date, to abandon that portion of its Chickasha Line that lies between MP 541.69 and 542.91, which is located in Oklahoma County, OK. Petition at 8

5. On August 5, 2008, Kessler filed Comments. Included with Kessler's Comments was a Verified Statement of Joseph T. Merry, General Manager of Boardman, Inc., a shipper with a rail spur on the Chickasha Line at MP 541.75.¹ Mr Merry made it abundantly clear that Boardman desires to utilize rail freight service, and explained that the reason Boardman had not requested rail service for the past several years, was because of the abysmal service BNSF had offered following the merger of the Burlington Northern with the AT&SF

6. In his Comments, Kessler points out that the portion of the Chickasha Line that is the subject of this proceeding, was (prior to BNSF's salvaging of the Line, starting in December, 2007) connected to the National Rail System at three points On the eastern end, near MP 540 15, where the Shields Spur intersected the Chickasha Line near Shields Blvd; In the middle, near MP 540.8, where the Chickasha Line connected to the adjacent Union Pacific line via a crossover track; On the western end, where the Packingtown Lead connected to the Chickasha Line near MP 542.8, or just west of Agnew Avenue.

7. On August 25, 2008, BNSF filed an Amendment to Petition ("**Amendment**") In its Amendment, BNSF correctly states that Kessler's civil Complaint against BNSF has been dismissed by the U S District Court for the Western District of Oklahoma. Dismissal of the Complaint mooted BNSF's request to have the Board rule that the court did not have the

¹ In paragraph 16 of Mr Merry's V S , Mr Merry stated Boardman's switch was "near MP 541 5 " On page 10 of BNSF's August 25, 2008 Amendment to Petition, BNSF stated Boardman's switch is actually located at MP 541 75

jurisdictional authority to enjoin BNSF from violating a Board order. (The Complaint was dismissed owing to the fact that the Board order Kessler was asking the court to enforce, was rendered moot by the Board's June 5, 2008 decision rejecting BNSF's NOE as void *ab initio*.)

8. Simultaneously with the filing of this Kessler's Reply to BNSF's Amendment to Petition, Kessler filed a Motion to Compel and a Motion to Cease and Desist. In Kessler's Motion to Compel, Kessler asks that the Board issue an order compelling BNSF to replace all track and track infrastructure that has been removed from the portion of the Chickasha line that was the subject of the Abandonment Exemption, and asks that the Board Compel BNSF to deliver railcar HTTX 93507 to Boardman, Inc. In Kessler's Motion to Cease and Desist, Kessler asks that the Board issue an order ordering BNSF, Stillwater Central Railroad, Inc. ("SLWC"), their agents, employees, contractors, and all other entities, to cease and desist from any further activities that would diminish the rail assets of the Chickasha line that lies between MP 539.96 and MP 542.91.

REPLY TO AMENDMENT TO PETITION

9. Since the U.S. District Court for the Western District of Oklahoma has dismissed as moot Kessler's Complaint asking that court to enjoin BNSF from violating the Board's order directing BNSF to cease all salvaging activities on the Chickasha line between MP 539.96 and MP 542.91, Kessler does not object to BNSF's request to amend its Petition for Declaratory Order, deleting its request to have the Board rule on the jurisdictional authority of the court to enjoin BNSF from violating a Board order.

10. In its Amendment, on p. 11, BNSF **incorrectly** states that the Shields Spur turnout has not been removed. The photographic evidence submitted by Kessler in the Abandonment Exemption (see Tom Elmore's March 20, 2008 Verified Statement, filed in the Abandonment Exemption), clearly shows that the Shields Spur turnout no longer exists. On August 30, 2008, Tom Elmore revisited this location and verified the Shields Spur turnout has not been replaced. See Tom Elmore's September 3, 2008 Verified Statement, attached hereto.

11. In its Amendment, on p. 11, BNSF states that it did not sanction removal of the crossover track connecting the Chickasha Line with the Union Pacific Line near MP 540.8. In its February 22, 2008, at p. 4, and May 20, 2008, at p. 4, decisions in *Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS*, STB Docket No. AB-103 (Sub-No. 21X), the Board made it clear, a rail carrier is ultimately responsible for

ensuring that its rail assets remain in place, and the Board made it clear that a rail carrier is ultimately responsible for the cost to replace any rail assets unauthorizedly removed.

12. Attached to its Amendment as Exhibit 3, is an undated photograph that BNSF states depicts the crossover track near MP 540.8 on the BNSF Chickasha line. The thru-track depicted in the center of the Exhibit 3 photograph, makes a substantial zig-zag prior to the turnout depicted in the photograph. The track on the right edge of the Exhibit 3 photograph, which BNSF states is Union Pacific's main line, has a substantial curvature. Appended to Mr. Merry's V.S. as Exhibit D, is a maps.live.com graphic showing the crossover at MP 540.8. The maps.live.com graphic clearly shows both the Chickasha and UP lines are **nearly tangent** in the vicinity of the MP 540.8 crossover. Kessler has personally viewed the crossover tracks at MP 540.8, and can attest to the fact that the Chickasha and UP lines are nearly tangent at that location, and that there are no zig-zags in the Chickasha Line at this location. The only tracks with a substantial curvature near this location, are the UP wye tracks, which are north of the UP main line (which in turn, is north of the Chickasha line). Since the Chickasha line at this location does not have a zig zag, the UP main line at this location is essentially tangent, the only tracks with a substantial curvature, are UP's wye tracks, which are north of the UP main line tracks, and since the photograph **does not** depict any tangent tracks between the tracks with the zig zag and the high-curvature tracks (which would correspond to UP's main line), Kessler argues, the photograph that appears in BSNF's Amendment Exhibit 3, **does not** accurately depict the crossover track at MP 540.8. In addition, this photograph was unaccompanied by a verified statement, and thus should be stricken from the record.

13. On p.12 of its Amendment, BNSF states that rail access to Boardman has not been permanently severed from the west. BNSF acknowledges that a signal mast has been erected in the middle of where the Chickasha tracks had been, and acknowledges that a portion of the Chickasha rail has been removed. Of particular significance, is BNSF's statement:

"The signal is not a permanent structure and can be readily relocated and the missing track can easily be replaced."

14. On p.12 of its Amendment, BNSF further represents that providing rail service to Boardman from the west (via the Western Segment,) **"would be more economical and operationally efficient than the routing Kessler has chosen."** Kessler **has not chosen** a particular

route to access Boardman. Kessler, in his Comments, identified four possible ways to access Boardman, one of which was “from the west.” Accessing Boardman exclusively “from the west.” without granting Boardman trackage rights over BNSF’s Packingtown Lead and Red Rock Subdivision lines, (in order to access Union Pacific’s line where it connects with BNSF’s line in east Oklahoma City), deprives Boardman of the access it has had to Union Pacific’s line at the MP 540 8 crossover track. Boardman having access to Union Pacific is very important to Boardman, since, as discussed below, BNSF’s service continues to be abysmal.

15. Since Kristy Clark, the author of BNSF’s Declaratory Order Petition, continues to provide the Board with false and misleading information regarding the status of the portion of the Chickasha line that is the subject of this proceeding, Kessler suggests that Ms Clark take Amtrak’s Heartland Flyer to Oklahoma City, then walk the line. Once she has obtained personal knowledge of the present condition of the line, she would be able to recognize when information being provided to her, does not comport with reality She might also find it helpful to peruse the Birds Eye feature of maps.live.com for Oklahoma City, to get a better understanding of what the line looked like in the summer of 2007, when the aerial photographs that appear on maps live com were taken.

16. On p.6 of its Amendment, BNSF states that by rerouting **overhead traffic** previously routed over the **Middle Segment**, onto the Packingtown Lead, **local service** to the Producers Co-Op and Mid-States Lumber Company (both of which are located on the **Eastern Segment**), has been preserved BNSF’s logic in making this statement eludes Kessler. What does **overhead traffic** on the **Middle Segment** have to do with **local service** on the **Eastern Segment**? And how does refurbishing the Packingtown Lead improve local service to Producers Co-Op and Mid-States Lumber Company, neither of which are even remotely near the Packingtown Lead? All Kessler can do is shake his head in disbelief then say, this statement represents one more misleading statement.

17. On p.6 of its Amendment, BNSF attempts to justify its decision to reroute overhead traffic onto the Packingtown Lead from the Middle Segment, by stating “moving the former right-of-way 200 feet to the south would have been much more difficult from an engineering standpoint and would have involved destroying a public baseball field and erecting crossings over several city streets.” BNSF did not provide any insight as to why it would have been more difficult from an engineering standpoint. More significantly, BNSF uttered another falsehood

when it stated a public baseball field would have been destroyed. There are no public baseball fields in the portion of the Middle Segment where ODOT proposes to build its freeway. As for crossings, the Middle Segment presently has grade-separated crossings, while the Packingtown Lead has at-grade crossings. Kessler would argue these statements by BNSF are totally irrelevant, and beg the question: Would relocating local traffic from the Middle Segment onto the Packingtown Lead result in a de facto abandonment of the Middle Segment? At the conclusion of its irrelevant remarks, BNSF correctly stated: "More importantly, the issue in this proceeding is not which realignment is most cost-effective but whether the realignment chosen by BNSF requires prior Board approval." Kessler argues "The end result of BNSF's proposed activities is the abandonment of the Middle Segment. Consequently, abandonment authority is required."

18. On p.6 of its Amendment, BNSF incorrectly states that BNSF's proposed relocation projects would adversely affect only two shippers. Given what BNSF proposes to do, only one shipper will be adversely affected. **Boardman**. Under BNSF's proposal, Boardman would permanently lose its access to rail service. It does not appear that Producers Co-Op and Mid-States Lumber, the two shippers BNSF refers to, will be adversely affected by BNSF's proposed activities, since BNSF is proposing to continue to provide rail service to these two shippers.

19. On p.7 of its Amendment, BNSF argues the Board does not have jurisdiction over highway projects, it is not the responsibility of the Board to assess the propriety of building a highway, and the Board has no authority to review the proposed alignment of a proposed highway. Kessler would fully agree with these BNSF arguments. However, when a proposed highway alignment impacts a line of railroad, the Board's jurisdiction is invoked. See, for example, *Wisconsin Central Ltd. v. The City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000), wherein the city attempted to condemn a portion of the railroad's property in order to realign a highway. Had the city been successful, the railroad would have had to relocate a portion of one of its passing tracks. The city argued the relocation of railroad property is not its regulation. The court made the following statements.

"The ICCTA does not define "regulation" in section 10102. Nevertheless, the plain meaning is apparent. "Regulation" is the "act or process of controlling by rule or restriction" See Black's Law Dictionary." Wisconsin Central Ltd. at 1013. (Emphasis added.)

“ The Court holds that condemnation is regulation. In using state law to condemn the track, defendant is exercising control - the most extreme type of control - over rail transportation as it is defined in section 10102 (9). The City is impermissibly attempting to subject to state law property that Congress specifically put out of reach. Congress’ preemptive language and intent is paramount, and the nature of the preempted state regulation is irrelevant. See *City of Auburn (supra)* ” *Wisconsin Central Ltd* at 1013-1014. (Emphasis added.)

20. On p.7 of its Amendment, BNSF correctly states that the rerouting of **overhead traffic** is within the managerial discretion of a railroad and does not require Board approval. Kessler agrees, BNSF’s decision to reroute its overhead traffic onto the Packingtown Lead, versus the Middle Segment of the Chickasha line, is not subject to Board review [Since SLWC never had authority to operate on the Middle and Western Segments of the Chickasha Line, SLWC’s use of the Packingtown Lead for its overhead traffic, rather than the Middle and Western Segments of the Chickasha Line, merely brought SLWC’s operations within the ambit of its authority. What continues to puzzle Kessler, is why SLWC sought authority to discontinue using the portions of the Chickasha line that lie between MP 539.96 and 540.0, and between MP 542.0 and MP 542.91 When the Board granted SLWC’s request to discontinue service over those portions of the Chickasha line, the Board created another problem: The only way SLWC can access the Red Rock Subdivision line at MP 540.15, is over the portion of the Chickasha line that lies between MP 539.96 and 540.0. The only way SLWC can access the Chickasha line that lies west of MP 542.91, from the Packingtown Lead, is over the portion of the Chickasha line that lies between MP 542.0 and MP 542.91. Fortunately for SLWC, discontinuance of service authority is permissive. So while SLWC has authority to stop using the portions of the Chickasha line that it needs to use to provide overhead traffic service between Oklahoma City and Lawton, OK, it is not **required** to stop using those portions of the Chickasha line But in granting SLWC authority to discontinue service over these two portions of the Chickasha line, which authority SLWC never intends to actually use (SLWC has no intention of discontinuing its overhead traffic service from Oklahoma City to Lawton, OK), another interesting issue was created. If a rail carrier is granted authority to discontinue service, then never actually discontinues providing that service, does the discontinuance of service authority ever lapse? Keep in mind, if a rail carrier does not consummate its abandonment authority within one year, the authority automatically lapses The Board’s regulations are silent with regard to consummating discontinuance of service authority. In addition, the present situation is decidedly untidy. If the reader was paying attention, the reader should have noted SLWC never had, nor does SLWC presently have, authority to operate

between MP 540.0 and MP 540.15. And it is impossible to get from SLWC's yard, which is about one mile east of MP 539.96, to the Red Rock Subdivision, without traversing over the portion of the Chickasha line that lies between MP 540.0 and MP 540.15. Perhaps SLWC should consider filing a request for authority to operate between MP 539.96 and MP 540.15, and should request that its discontinuance of service authority be voided. Doing so would tidy up the mess that SLWC created.]

21. On p.8 of its Amendment, BNSF makes the following statement:

"Moreover, the relocation of the Middle Segment does not affect service to local shippers since there are no shippers located on that 1.54-mile segment of track."

22. In delineating the boundaries of the Middle Segment, BNSF was careful to make the cut mark at MP 541.69, which is at the intersection of the Chickasha line with the eastern side of S. McKinley Avenue. Boardman's plant is on the west side of S. McKinley Avenue. By careful selection of its cut mark, BNSF could truthfully make the statement that no shippers were located on the Middle Segment. However, the portion of its statement that states no local shipper would be affected by relocating the Middle Segment, is **not truthful**. Boardman's spur is at MP 541.75, or about 300 feet west of the Middle Segment cut mark. If the Chickasha line is abandoned east of MP 541.69, there would only be 300 feet of track left east of / past Boardman's turnout. Boardman ships 20+ 200-foot long units per year. These 200-foot long units require the use of four flat cars. If, prior to delivering a string of rail cars to Boardman, the carrier must first remove the rail cars that are on Boardman's spur, then the tracks past Boardman's spur must be long enough to accommodate whatever cars are on Boardman's spur. Boardman's spur tracks are about 600' long. Therefore, at a minimum, there should be at least 600 feet of track past Boardman's turnout. And if the switching carrier does not wish to block McKinley Avenue while it is shuffling cars into / out of Boardman, there needs to be 700 feet of track on the east side of McKinley Avenue, to accommodate whatever cars are on Boardman's spur, plus the length of a locomotive. Anything less than 700 feet of track on the east side of McKinley Avenue, would adversely affect a switching carrier's ability to service Boardman. This rather simple calculation was based on the premise that the switching carrier was only transporting cars for Boardman. The reality is, the local switching crew is likely to have a number of cars in its consist that are destined for other shippers located west of MP 541.91. (In the Abandonment Exemption proceeding, mention was made of a number of significant shippers,

including a cement plant, that lies just west of MP 541 91.) If the switching crews' consist contained 20 or so cars, then there would need to be sufficient track east of McKinley Avenue to accommodate those cars. Twenty cars at an average length of 65 feet would require 1,300 feet of track to accommodate the cars, plus another 200 feet of track to accommodate two locomotives, or a total of 1,500 feet or so of track. From this rather simple calculation, one would conclude **any removal of the Chickasha line west of MP 541.4, would adversely affect a switching carrier's ability to provide service to Boardman.**

23. The discussion in the preceding paragraph presumes that Boardman would be serviced exclusively "from the west." Servicing Boardman exclusively "from the west," would deny Boardman access to the Union Pacific line located at MP 540.8. Given the abysmal service provided to Boardman by BNSF in the past, and given the abysmal service provided to Boardman by BNSF and SLWC recently (see paragraphs 18-27 of Kessler's Motion to Compel), Boardman does not want to be captive to these two carriers. Furthermore, servicing Boardman "from the west," assumes service could be provided "from the west." While BNSF makes light of the difficulty of relocating the signal mast that was placed in the Chickasha trackbed at MP 542.8, Kessler believes that relocating this signal mast will prove to be quite difficult.² Until that signal mast has been relocated, and the Chickasha tracks have been reconnected, Kessler argues that abandoning any portion of the Chickasha line that lies between MP 540.8 and MP 542.8, would seriously adversely affect a carrier's ability to provide service to Boardman, for presently, the only viable way to reach Boardman would be via the crossover track that connected the Chickasha line to the Union Pacific line at MP 540 8.

24 On p.8 of its Amendment, BNSF states that Producers Co-Op and Mid-States Lumber were originally served from the AT&SF Red Rock Line. Had BNSF's counsel carefully studied aerial photographs taken some years ago, BNSF's counsel would have noted the AT&SF ramp off of the Red Rock line **never** provided service for Producer's Co-Op, nor did it access Mid-States Lumber's yard. The ramp track paralleled the Red Rock line, then dead-ended. The

² The signal mast supports a cantilevered signal. It must be supported by a substantial block of concrete placed in the ground. (In the order of 10-feet by 10-feet by 10-feet.) Fifteen feet north of the existing signal mast foundation, is the old signal mast foundation, which was partially destroyed. Five feet north of the former signal mast foundation, is a roadway that provides access to the commercial businesses located north of this crossing. The signal mast cannot be placed in this roadway, for doing so would block the only access to these businesses. It would appear to Kessler that it may not be feasible to relocate the signal mast, given the physical constraints that exist.

AT&SF ramp track never connected to the St. Louis and San Francisco's Producers Co-Op spur track, nor did the AT&SF ramp track connect to the St. Louis and San Francisco's Mid-States spur track

25. On pp.8-9 of its Amendment, BNSF argues that Kessler used "faulty logic" when he noted that the additional track being proposed by BNSF appears to be branch-line track, rather than spur-track, and that the existing spur-track may in fact be existing branch-line track. BNSF noted that Kessler did not cite any case to support Kessler's position. (Kessler could have cited *Effingham* and other cases, but did not, since the Board is intimately familiar with these cases.) Kessler notes that BNSF did not cite any case to support its position either. What Kessler did, was cite the statute (§10901) that governs diamonds, then noted that statute addresses lines of railroad, rather than unregulated §10906 excepted track. Since this may be an issue of first impression, it would be appropriate for the Board to resolve the issue of whether removal of a diamond requires Board authority. Kessler further believes that the Board should resolve the issue of whether BNSF's proposed spur track, which crosses the land of one shipper (Mid-States Lumber) to reach the land of an adjacent shipper (Producers Co-Op), would require Board authority prior to its construction, particularly in light of the fact that no permanent easement across Mid-States Lumber's land has been executed.

26. On p. 10 of its Amendment, BNSF states that Boardman's turnout is located at MP 541 75, which Kessler accepts, since BNSF has possession of the Valuation Maps that should indicate precisely where this turnout is located.

27. On p.10 of its Amendment, BNSF correctly notes that Boardman has not used rail service for the past five years. Mr. Merry indicated in detail why Boardman stopped using rail service: Following BN's merger with the AT&SF, service deteriorated so much, Boardman could no longer tolerate it. It was simply too unreliable and too frustrating. Boardman made it clear. If reliable service were available, Boardman would utilize it.

28. On p.11 of its Amendment, BNSF states that BNSF would be willing to work with Boardman to meet Boardman's rail needs. Boardman has made it clear, it desires reliable rail service. Rail car HTTX 93507 has been consigned to Boardman. BNSF's handling of that car to date, demonstrates BNSF's service still is abysmal: BNSF's web site said it would take 3-4 days for the car to move from Wilson, Arkansas to Oklahoma City, a distance of about 450 road miles.

It in fact took 19 days. Had the load on the rail car been sent via motor carrier, it would have arrived in two days. BNSF gave the car to SLWC, to make the final delivery SLWC does not have the authority to operate on the tracks that service Boardman. (See ¶5 of Kessler's Motion to Compel, which details the limits of SLWC's authority.) SLWC refuses to deliver the car, and BNSF has made no effort to retake possession of the car, then effect delivery of the car Effectively, Boardman is testing BNSF's ability to perform How well BNSF performs over the next 30 days, will be telling, and decisive.

29. On p.11 of its Amendment, BNSF falsely states the Shields Spur turnout was not removed, and is used daily It was removed in February, 2008, and to date, has not been replaced. As Kessler suggested in ¶15, *supra*, counsel for BNSF should consider taking Amtrak's Heartland Flyer to Oklahoma City, then walk the line, so that counsel comprehends the present condition of the line.

CONCLUSION

30 Kessler has a burning desire to preserve rail service on the Chickasha line. Boardman has a desire to utilize reliable rail service. BNSF proposes to abandon rail service on a critical portion of the Chickasha line The Oklahoma Department of Transportation ("ODOT") has a desire to build a freeway in a portion of the Chickasha right-of-way. Kessler has suggested four alternatives, any one of which would preserve rail service while permitting ODOT to build its freeway. To date, BNSF has taken the position that it will prevail, so there is no reason to even consider alternatives that would preserve rail service in this rail corridor. Kessler has offered to discuss alternatives that would permit ODOT to build its freeway, while preserving rail service. In response, BNSF, ODOT and SLWC, have salvaged substantial portions of the line, and continue to salvage the line, in open defiance of the Board's order to cease salvaging the line. BNSF has attempted to circumvent the Board's regulatory authority by labeling their project a "relocation," and by totally disregarding the impact their 'relocation' project would have on Boardman's ability to continue to have rail service Kessler has argued BNSF's project is in fact an abandonment proceeding, and should be handled as such. Had BNSF not misled the Board with false and misleading representations in its original NOE, this matter would have been resolved by now. While Kessler does not object to BNSF's request that the Board expedite its decision in this matter, Kessler does not want the Board to rush to judgment, simply because ODOT has a schedule to keep

Respectfully submitted,



Edwin Kessler

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2008, a copy of the foregoing Kessler's Reply to BNSF's Amendment to Petition, was mailed by first class mail, postage prepaid, to Kristy Clark, BNSF Railway Company, 2500 Lou Menk Drive, Fort Worth, TX 76131-2828, and a copy was E-mailed to Fritz Kahn, 8th Floor, 1920 N Street, N.W., Washington, DC 20036-1601.



Edwin Kessler

VERIFIED AFFIDAVIT OF THOMAS ELMORE
September 3, 2008

1 I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit

2 On the afternoon of Saturday, August 30, 2008, I traveled the length of the BNSF, former Frisco Line in Oklahoma City, OK from MP 542.91 to MP 539.96, observing and photographing its current state. Selected photos made that day accompany this document. This line is the subject of Surface Transportation Board Docket Number AB-6 430X, Case Title BNSF RAILWAY COMPANY - ABANDONMENT EXEMPTION - IN OKLAHOMA COUNTY, OK, and is also more recently the subject of STB Finance Docket No. 35164. My observations follow:

3 At MP 542.91, the area near S Agnew Avenue, I observed the same, modern, cantilevered crossing signal that I first noted on the afternoon of February 26, 2008, its quite substantial concrete base planted directly in the BNSF, former Frisco line road bed. Despite BNSF's assertion on Page 12 of its August 25, 2008 "Amendment to Petition, Response to Comments and Renewed Request for Expedited Handling" to STB Finance Docket No. 35164, the structure looks quite permanent.

4 Further east along the line at the SW 15th Street crossing, the S Pennsylvania Avenue crossing and the Westwood Boulevard crossing, the automatic signal bridges and / or masts have been recently stripped of their flashers and related electrical boxes have had their wiring and hardware removed. The flashers at SW 15th were certainly removed since I observed them in place on February 26, 2008. I observed the S. Pennsylvania and Westwood Boulevard flashers still in place as late as July 18, 2008.

5 At approximately MP 541.80, just east of the S. Indiana Avenue crossing, approximately 20 feet of track is still absent from the line. However, the remaining, jointed track still on the ground from this point east to the Boardman switch has had its spikes pulled, track bolts cut and joint bars removed.

6. The Boardman, Inc. switch and turnout at approximately MP 541.75 has similarly suffered nearly complete removal of fasteners. Joint bars, spikes, nuts, lock washers and torched bolts lie on the ground near where they were removed.

7 At the S. Western Avenue crossing, control and electrical boxes for the automatic crossing signals were gutted of wiring and operational components and then removed on July 17 and 18, 2008.

8. At Lee Avenue, near MP 540.80, approximately 202 feet of track is still absent, and the large construction pit for the now weedgrown, unfinished ODOT culvert project is open, only partially backfilled, with jagged steel shoring exposed and would seem to present a significant safety hazard, especially to children.

9 The crossover track from the BNSF, former Frisco line beginning at the switch and turnout at MP 541 is cut and disconnected from the Union Pacific, former Rock Island line just east of the S Shartel Avenue crossing boards.

10 Between Robinson and Santa Fe Avenues, the substantial portion of track removed on February 14, 2008 is still missing. Even more of the track material lying further west from about MP 540.45 was either cut, apparently for removal, or marked for cutting.

11 The switch and turnout to the "Shields Spur" from the original BNSF, former Frisco line at MP 540 15, removed sometime between February 26, 2008 and March 19, 2008, is still missing

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true and correct to the best of my knowledge and belief.

Thomas Elmore 9-03-08
Thomas Elmore Date

STATE OF OKLAHOMA, Cleveland COUNTY, to wit:

I HEREBY CERTIFY, that on this 3 day of September, 2008, before me, a Notary Public of said State, personally appeared Thomas Elmore, known to me or satisfactorily proven to be the person whose name is subscribed to the within Affidavit, and who acknowledged that he executed the same, for the purposes herein contained.

AS WITNESS my hand and notarial seal

My commission expires: 10/22/2008 Donna J. Hoffman
Notary Public

